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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BH & SONS, LLC, Cross-complainant and Respondent, v. PRISCILLA AHERN et al., Cross-defendants and Appellants.	B272165 (Los Angeles County Super. Ct. No. BC578510)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward and Eric V. Anderton for Cross-defendants and Appellants Priscilla Ahern and Thomas Ahern.

Jackson Tidus, M. Alim Malik, Kathryn M. Casey and Charles M. Clark for Cross-complainant and Respondent.

Thomas and Priscilla Ahern appeal from the order denying their special motion to strike under Code of Civil Procedure section 425.16 (section 425.16) directed to the cross-complaint filed against them by BH & Sons, LLC for breach of contract, declaratory relief and express indemnity.[1] The trial court ruled none of BH & Sons' claims, based on allegations that the Aherns had breached representation and warranties made in connection with their tenancy in common investments in two real estate ventures promoted by BH & Sons, arose from protected speech or petitioning activity within the meaning of section 425.15. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The La Palma Avenue and Aero Drive Transactions*

In 2006 BH & Sons purchased commercial real property located at 5515 East La Palma Avenue in Anaheim. When acquiring the La Palma Avenue property, BH & Sons and its manager, Asset Management Consultants, Inc. (AMC), intended to resell direct or indirect fractional ownership interests in the property as an investment with contemplated tax benefits for the new purchasers. To that end, BH & Sons and AMC provided property information packages and a private placement memorandum to various qualified sophisticated individual investors and entities. Investors either formed their own single purpose limited liability companies, which purchased an interest in the La Palma Avenue property as tenants in common, or

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1 Priscilla Ahern died in September 2016 while this appeal was pending. Thomas and Priscilla Ahern owned the investments at issue as community property, and Thomas Ahern has succeeded to her 50 percent interest as her surviving spouse.

became limited partners in Amlap Venture, L.P., which then purchased a tenancy in common interest in the property.

The Aherns expressed an interest in purchasing a tenancy in common interest in the La Palma Avenue property. BH & Sons provided them a preliminary information package, which cautioned, "Prior to making an investment in the Property, prospective investors and their professional advisors should carefully review the entire Package and it exhibits." The material included a "risk factors" section, which advised potential investors to "consult their personal counsel, accountant and other professional advisors with regard to legal, tax, economic and related matters concerning this investment and its suitability to their needs. . . . In deciding whether to invest, each prospective investor must conduct and rely on its/their own evaluation of the property and [tenancy in common] interests offered."

The Aherns elected to go forward with the investment in the La Palma Avenue property and executed a purchase and sale agreement as of August 17, 2006. In that agreement they represented they "ha[d] performed or will perform prior to the Approval Deadline such due diligence examination, reviews and inspections of all matters pertaining to the property . . . as it deems appropriate. [Tenant in common] has obtained or will obtain such information as it deems necessary, has relied upon its independent review of the Property and of any information independently acquired by it in making its decision to acquire [its] Property Interest." The Aherns as tenants in common also agreed to indemnify and hold BH & Sons harmless "from and against any loss, damage, liability, cost and expense (including reasonable attorney's fees and costs) arising from or due to any breach of this Agreement or any of [tenant in common's]

representations and warranties, and from any false statement, representation or omission made by [tenant in common] in this Agreement . . . ."

In the second half of 2006 BH & Sons acquired commercial real estate located at 8825 and 8875 Aero Drive in San Diego. As with the La Palma Avenue property, individuals and entities who wanted to purchase an interest in the Aero Drive property could do so directly as a tenant in common or by investing in a limited partnership that, in turn, would purchase a tenancy in common interest in the property. The Aherns expressed an interest in this investment opportunity and were provided a property information package that contained the same cautionary language as the material provided in connection with the La Palma Avenue investment.

Once the Aherns decided to invest in the Aero Drive property, they executed a tenancy in common purchase and sale agreement with BH & Sons. They again represented they had or would perform all due diligence reviews and had or would obtain such information as they deemed necessary and had relied on their independent review in making the decision to invest. The Aherns also agreed to indemnify and hold BH & Sons harmless from and against any loss, damage, liability, cost and expense "arising from or due to any breach of this Agreement or any of [tenant in common's] representations and warranties, and from any false statement, representation or omission made by [tenant in common] in this Agreement . . . ."

2. *The Ahern Lawsuits Against BH & Sons and AMC*

In May 2012 the Aherns and several other investors sued BH & Sons, AMC and related parties in Los Angeles Superior Court, *Ahern v. Asset Management Consultants, Inc.*, BC484356,

alleging the offering materials for the La Palma Avenue transaction misrepresented the purchase price and fair market value for the property by falsely labeling a $1.3 million real estate commission to be paid to AMC and its affiliates when, in fact, "what was purported to be a commission was an illegal and secret mark-up of the Property purchase price in which the defendants conspired to inflate the price to hide the fact the Property could have been purchased for $30,000,000 or less" and to disguise the fact that the purported commission was actually being paid by the investors, not the original seller.

The claims against BH & Sons and AMC and several related parties were ordered to arbitration. The Aherns and the other plaintiffs elected not to pursue those claims in arbitration and to continue with their lawsuit against the remaining defendants. However, BH & Sons and AMC demanded that arbitration continue regarding their affirmative claims for contractual indemnity based on the alleged breach of representations and warranties in documents signed by the Aherns, as well as by coplaintiffs Michael and Pamela Stella, in connection with their investments in the La Palma Avenue property. The arbitrator, Alexander Polsky, found in favor of BH & Sons and the other AMC parties, awarding them all fees and costs incurred in responding to the underlying lawsuit. The superior court confirmed that award. However, we reversed the judgment and directed the superior court to grant the petition to vacate the award, holding the arbitration provision upon which the court had relied when it compelled arbitration did not apply to the limited partnership or tenancy in common investors. (*Ahern v. Asset Management Consultants, Inc.* (Aug. 11, 2015, B253974 & B257684) [nonpub. opn.].)

On April 14, 2015, prior to our decision vacating the Polsky arbitration award, the Aherns filed the instant action against BH & Sons, AMC and several related parties in Los Angeles Superior Court, alleging they had been defrauded when purchasing their tenancy in common interest in the Aero Drive property, *Ahern v. Asset Management Consultants, Inc.*, BC578510. The gravamen of the present lawsuit, like the original action involving the La Palma Avenue property, is that the offering materials prepared and distributed by BH & Sons and AMC misrepresented the actual purchase price and fair market value of the real property acquired by mislabeling as a real estate commission to be paid by the seller what was, in reality, a kickback (or syndication fee) being paid to AMC from investor funds.

3. *BH & Sons' Cross-complaint for Breach of Contract and Indemnity*

On November 20, 2015 BH & Sons filed its cross-complaint against the Aherns for breach of contract, declaratory relief and indemnity, alleging the same basic claims as had been presented in the Polsky arbitration.[2] The cross-complaint alleged, when

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[2] Several weeks after BH & Sons filed its cross-complaint, AMC and seven limited liability companies that AMC manages sued Michael and Pamela Stella, coplaintiffs with the Aherns in the 2012 investor litigation concerning the La Palma Avenue property, for breach of contract, express indemnity and declaratory relief, *Asset Management Consultants, Inc. v. Stella*, BC604757. AMC's lawsuit, like BH & Sons' cross-complaint, asserts the same claims as presented in the Polsky arbitration.

The AMC parties and BH & Sons are represented in both actions by the same counsel. The Stellas and the Aherns are also

they signed the purchase and sale agreements to acquire tenancy in common interests in the La Palma Avenue and Aero Drive properties, the Aherns made several material representations and warranties to BH & Sons concerning their review of documents and independent investigation of the transactions. BH & Sons further alleged it had relied on those representations and, given the high risk nature of the investments, would not have entered into the purchase and sale agreements with the Aherns if they had known any of the representations were untrue. However, BH & Sons subsequently learned (when the Aherns filed their fraud lawsuits) that the Aherns had breached the purchase and sale agreements by making false representations; and as a result, BH & Sons alleged, the Aherns are responsible pursuant to the indemnification and hold-harmless provisions of the agreements for all damages resulting from those breaches and untrue representations (the costs of defending the investor lawsuits).

In particular, BH & Sons alleged the representations regarding due diligence summarized in section 1 of this opinion were false and the Aherns breached each purchase and sale agreement by making those false representations. Additionally, BH & Sons alleged the following representation made in connection with each purchase was false: "TIC [tenant in

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represented in both actions by the same counsel. For some reason, however, the two cases have not been related in the superior court and are being heard by different trial judges. Our decision affirming the order denying the Stellas' special motion to strike pursuant to section 425.16 was filed last week. (*Asset Management Consultants, Inc. v. Stella* (May 31, 2017, B272121) [nonpub. opn.].)

common] acknowledges that in connection with the acquisition of the Property, the TIC Purchase Price includes a payment to BH [& Sons] in consideration for its sale and transfer of TIC's Property Interest to TIC that exceeds TIC's Percentage Share of the Underlying Contract Price. TIC acknowledges that the Managing Member of BH [AMC] is a licensed real estate broker in the State of California who is acting as a principal for its own account and to make a profit."

4. *The Special Motion To Strike*

The Aherns responded to the cross-complaint by filing a section 425.16 special motion to strike.[3] In their moving papers the Aherns asserted the principal thrust (or gravamen) of BH & Sons' claims for breach of contract and indemnity was that the allegations made in the Aherns' fraud lawsuits regarding the La Palma Avenue and Aero Drive properties were false, directly contradicted by the offering materials in each transaction. Accordingly, the cross-complaint was premised on statements made by the Aherns in judicial proceedings and, therefore, arose from protected petitioning activity. The Aherns also argued BH & Sons could not establish a probability of prevailing on its claims because they were barred by the absolute litigation privilege in Civil Code section 47, subdivision (b), as well as the governing statutes of limitation. The Aherns also challenged the adequacy of BH & Sons' theory of causation.

In its opposition BH & Sons argued it had not pleaded causes of action arising from the Aherns' petitioning activity but rather claims based on false representations in connection with their two tenancy in common investments with BH & Sons. The

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[3] The Aherns also demurred to the cross-complaint.

Aherns' lawsuits, as alleged in the cross-complaint, brought to light the BH & Sons' dispute with the Aherns regarding their obligations and duties under the purchase and sale agreements, but were not the bases for the breach of contract or indemnity claims. That is, the Aherns' petitioning activity was incidental to the controversy although it did provide notice for purposes of applying the delayed discovery rule to determine the timeliness of BH & Sons' claims.

On the merits BH & Sons argued the cross-complaint was both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment: It presented evidence supporting the contention the Aherns had misrepresented their review of the relevant documentation before investing and argued it had adequately pleaded accrual of the causes of action was delayed until the Aherns filed their fraud lawsuits. Finally, because the cross-complaint was not based on allegations made in their lawsuits or communications relating to them, the litigation privilege did not protect the Aherns from what was a straightforward breach of contract action relating to the tenancy in common transactions.

At the hearing on the special motion to strike, counsel for the Aherns expanded on the argument that the cross-complaint was necessarily based upon the allegedly false allegations made in the investor lawsuits, not a breach of representations and warranties in the tenancy in common purchase agreements, explaining that the contract provisions identified by BH & Sons did not obligate the Aherns to do anything. Rather, the Aherns agreed only that they would perform such due diligence and obtain such information as they deemed necessary, "a subjective test as to what the Aherns deemed necessary." According to the

Aherns, that was not a representation or warranty that could be breached. Counsel for BH & Sons disagreed, arguing that the allegations in the investors' fraud lawsuits regarding the discovery of information that would have been material to their investment decisions demonstrated that the Aherns did not, in fact, do whatever investigation they deemed necessary prior to the investments.: "[T]heir failure to investigate has caused the situation."

The superior court denied the motion, suggesting to the Aherns' counsel that his argument regarding the subjective nature of the purported representations and warranties at issue was more properly presented in a motion for summary judgment. The court ruled that none of BH & Sons' claims arose from protected speech or petitioning activity and, therefore, section 425.16 did not apply to the cross-complaint. Because it concluded the Aherns had failed to satisfy their burden on the first step of the required analysis under section 425.16, the court did not consider whether BH & Sons had demonstrated a probability of success on the merits.[4]

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[5]

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's

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[4] The following month the court overruled the Aherns' demurrer to the cross-complaint, which had also raised the litigation privilege and statutes of limitation as defenses.

[5] SLAPP is an acronym for "strategic lawsuit against public participation." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.)

right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)[6] In ruling on a motion under section 425.16, the trial court engages in what is now a familiar two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

a. *Step one*

The moving party's burden on the threshold issue is to show "the challenged cause of action arises from protected

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[6] Pursuant to section 425.16, subdivision (e), an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; see *Baral*, *supra*, 1 Cal.5th at p. 396 ["[a]t the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them"].) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).)

The mere fact an action was filed after protected activity took place does not mean it arose out of protected activity. (*City of Cotati, supra,* 29 Cal.4th at pp. 76-78; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) Thus, a claim filed in response to, or in retaliation for, threatened or actual litigation, even if properly viewed as an oppressive litigation tactic, is not subject to section 425.16 simply because it was triggered by protected activity. (*City of Cotati*, at p. 78; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924.) The critical inquiry always is whether the claim is based on the defendant's protected activity. (*Park v. Board of Trustees of the California State University* (2017) 2 Cal.5th 1057, 1063-1064 (*Park*); *Baral*, *supra*, 1 Cal.5th at p. 396; *City of Cotati,* at pp. 76-77.)

b. *Step two*

If the moving party fails to demonstrate that any of the challenged claims for relief arise from protected activity, the court properly denies the motion to strike without addressing the second step (probability of success). (*City of Cotati*, *supra*, 29 Cal.4th at pp. 80-81; *Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc*. (2015) 235 Cal.App.4th 361, 367.) However, if the defendant satisfies the first step, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Baral*, *supra*, 1 Cal.5th at p. 396; accord, *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714; accord, *Baral*, at p. 385 [the court "accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law"].)

We review the trial court's rulings on both the first and second steps independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1055.)

2. *BH & Sons' Cross-complaint Does Not Arise From the Aherns' Protected Petitioning Activity*

According to the Aherns' opening brief, "[T]he liability BH [& Sons] asserts against Ahern is indisputably its costs of

defending itself in the Underlying Actions. . . . [T]he conduct relied upon as causing BH [& Sons]'s injury, at least in part, is the contention that the factual allegations made in the Underlying Acts were false and readily contradicted by the [offering materials]. Ahern's purportedly untrue allegations in the Underlying Actions are not merely incidental to BH [& Sons]'s claims; rather, it is the only activity by Ahern that caused BH [& Sons]'s need to defend itself. Said another way, but for the Underlying Actions, BH [& Sons]'s claims would have no basis." The Aherns' argument misconstrues BH & Sons' cross-complaint and misapprehends the Supreme Court's analysis of section 425.16 in *City of Cotati*, *supra*, 29 Cal.4th 69 and *Navellier*, *supra*, 29 Cal.4th 82.

The Aherns are, of course, correct that a claim arising out of the defendant's litigation activity directly implicates the right to petition and is subject to a special motion to strike. (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056 ["'[a] cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike'"]; see *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.) But, as discussed, that the lawsuit being challenged was triggered by earlier litigation activity does not, without more, establish that it arises from, or is based on, protected petitioning activity. *City of Cotati* and *Navellier* illustrate the difference.

In *City of Cotati* the Supreme Court held a declaratory relief action that was unquestionably prompted by, and related to, earlier litigation activity did not satisfy the first prong of the section 425.16 analysis. Owners of mobilehome parks had filed a declaratory relief action against the City of Cotati in federal court seeking a judicial determination that the City's rent control

ordinance constituted an unconstitutional taking. (*City of Cotati*, *supra*, 29 Cal.4th at pp. 71-72.) In response, the City sued the park owners in state court, requesting a declaration the rent control ordinance was valid and enforceable. (*Id*. at p. 72.) The City "concede[d] that its purpose in filing the state court action was to gain a more favorable forum in which to litigate the constitutionality of its mobilehome park rent stabilization ordinance," and it intended "to seek to persuade the federal court to abstain from hearing [the owners'] suit." (*Id*. at p. 73.) The Supreme Court rejected the argument the filing of the City's action arose from the filing of the earlier federal action within the meaning of section 425.16. Although the City had acknowledged its only ground for alleging the existence of an actual controversy was the fact the park owners had sued it in federal court, because the basis for the City's request for relief was the underlying controversy respecting the rent control ordinance, the Court held the City's lawsuit was not subject to a special motion to strike. (*City of Cotati*, at pp. 79-80.)

In *Navellier*, in contrast, the Supreme Court held a claim for breach of a release clause in a contract was subject to section 425.16 because the alleged breach consisted of asserting claims in litigation (in a counterclaim in a federal lawsuit that had been initiated prior to the release agreement) that had purportedly been released under the contract: "In alleging breach of contract, plaintiffs complain about Sletten's having filed counterclaims in the federal action. Sletten, plaintiffs argue, 'counterclaimed for damages to recover money for the very claim he had agreed to release a year earlier' . . . . [¶] . . . Sletten is being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and Sletten's

alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Navellier*, *supra*, 29 Cal.4th at p. 90.)

Unlike the plaintiffs in *Navellier*, BH & Sons did not allege in its cross-complaint that the Aherns' filing of the two investor lawsuits breached their contract for the purchase of tenancy in common interests. Rather, as in *City of Cotati*, the lawsuits filed by the Aherns alleging they were unaware of the true purchase price and fair market value of the La Palma Avenue and Aero Drive properties alerted BH & Sons to the Aherns' failure to review the offering materials to the extent they deemed necessary to make the investments, as they had represented they would do. That is, the lawsuits are evidence of the breach of warranties and representations. However, it was the Aherns' alleged failure to comply with their obligation to conduct an appropriate due diligence before investing that constituted the breach of contract—the wrongful conduct that was the injury producing activity. (See *Park*, *supra*, 2 Cal.5th at p. 1064 [in the first step of the anti-SLAPP analysis, care must be taken "to respect the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim"].)

The Aherns fare no better by arguing BH & Sons' cross-complaint for breach of contract and indemnity is predicated on statements made by the Aherns in judicial proceedings, that is, that BH & Sons sued them because they purportedly alleged facts in the investor lawsuits that are inconsistent with the offering materials provided with the tenancy in common investments. If that were so, BH & Sons' cross-complaint would be akin to a (premature) malicious prosecution action and would certainly be

based on protected petitioning activity. (See *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th 728.) But, as the trial court concluded, the Aherns have it backward. The wrongful and injury-producing conduct established by the alleged inconsistency between the disclosures in the offering and sales memoranda and the allegations in the Aherns' lawsuits, according to the cross-complaint, is the breach of the obligation to carefully review those financial disclosures at the time of the investments, not subsequently pleading they were unaware of information that had actually been disclosed.

To be sure, the need to defend the lawsuits filed by the Aherns regarding the La Palma Avenue and Aero Drive properties is the injury that has allegedly resulted from the breach of warranties and representations, and the costs associated with defending those lawsuits constitute the damages BH & Sons seeks to recover. To that extent, as counsel for BH & Sons' conceded in the trial court, but for the Aherns' litigation activity, BH & Sons would not have filed the present lawsuit. But as our colleagues in Division Three of this court explained in *Renewable Resources Coalition, Inc. v. Pebble Mines Corp*. (2013) 218 Cal.App.4th 384, 396-397 (*Renewable Resources*), "[T]o determine the applicability of the anti-SLAPP statute, we look to the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct*."

At issue in *Renewable Resources*, *supra*, 218 Cal.App.4th 384 was a lawsuit by Renewable Resources Coalition, Inc. against two entities and their attorneys (the Pebble defendants) who had obtained (by paying $50,000) confidential documents from a former fundraiser for Renewable Resources Coalition. Once obtained, the documents were used by the Pebble defendants to

prosecute a complaint for election law violations against Renewable Resources Coalition before a state agency. The trial court granted the Pebble defendants' special motion to strike causes of action for interference with contract and interference with prospective economic advantage, ruling with respect to the first prong of the section 425.16 analysis that the two claims arose out of the Pebble defendants' filing of the administrative complaint, which was protected petitioning activity. (*Renewable Resources*, at pp. 387, 391-392.)

The Court of Appeal reversed the order granting the special motion to strike, concluding the Pebble defendants' alleged liability arose from their conduct in bribing the former fundraiser to turn over confidential documents, not from their subsequent actions in filing the election law complaint: "[T]he trial court erroneously focused on the Coalition's damages allegations, i.e., that the Coalition was forced to defend itself in the [administrative] proceeding. Instead, the proper focus should have been on the 'allegedly wrongful and injury-producing conduct' [citation] which gave rise to the Coalition's damages." (*Renewable Resources*, *supra*, 218 Cal.App.4th at p. 396.)

According to the BH & Sons cross-complaint, the costs incurred in defending the Aherns' lawsuits flowed from the Aherns' breach of the representations and warranties in the tenancy in common purchase and sale agreements. That breach, like the bribe alleged in *Renewable Resources*, was not an exercise of the constitutionally protected right of petition or free speech. As Division Three explained with respect to the damage allegations in *Renewable Resources*, BH & Sons' claim for damages and indemnification—the costs of defending litigation initiated by the Aherns as a consequence of their allegedly

wrongful conduct—does not make the cross-complaint subject to a special motion to strike under section 425.16.

DISPOSITION

The order denying the special motion to strike is affirmed. BH & Sons is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.